

October 1971

The Freedom of Academic Freedom: A Legal Dilemma

Luis Kutner

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

Luis Kutner, *The Freedom of Academic Freedom: A Legal Dilemma*, 48 Chi.-Kent L. Rev. 168 (1971).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol48/iss2/4>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

THE FREEDOM OF ACADEMIC FREEDOM: A LEGAL DILEMMA

LUIS KUTNER*

Because modern man in his search for truth has turned away from kings, priests, commissars and bureaucrats, he is left, for better or worse, with professors.

—Walter Lippman.

Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action. . . .

—John Stuart Mill, *On Liberty*.

I. INTRODUCTION

IN THESE DAYS of crisis in higher education, part of the threat to academic freedom—which includes the concepts of freedom of thought, inquiry, expression and orderly assembly—has come, unfortunately, from certain actions by professors, who have traditionally enjoyed the protection that academic freedom affords.

While many of the professors who teach at American institutions of higher learning are indeed competent and dedicated scholars in their fields, a number of their colleagues have allied themselves with student demonstrators and like organized groups who seek to destroy the free and open atmosphere of the academic community. These faculty members have incited, encouraged, and even participated in campus disorders disrupting the educational process. A most recent example of such acts occurred during May, 1970, following the Cambodian operation and the tragedy at Kent State University of Ohio, when activist professors forsook their academic duties and turned their classes into “anti-war rallies.”¹

At this time of hysteria, S. I. Hayakawa, along with other college administrators, felt that those who were paid to teach subjects, such as

* Member, Illinois Bar, Indiana Bar; University of Chicago; former visiting Associate Professor, Yale Law School; Chairman, World Habeas Corpus Committee, World Peace Through Law Center; former Consul, Ecuador; former Consul General, Guatemala; former Special Counsel to the Attorney General of Illinois; author of numerous law journals articles and several books, including *World Habeas Corpus* and *I, the Lawyer*.

The Assistance of B. Alan Burgwald, M.A., is acknowledged.

¹ S.I. Hayakawa, *Academic Freedom: Just What Is It?* Chicago Tribune, Nov. 29, 1970 § 1A at 5, col. 1&2.

literature or math, should continue to do so regardless of what political activities they might want to engage in outside of class hours.² To be sure, faculty (or students, for that matter) do not work on a 9-to-5, 5-day-a week schedule. Although they are certainly expected to meet their classes and teach the subjects for which they were hired, the otherwise loose structure and pattern of freedom established at most, if not all, major universities does provide a great deal of time to devote to external politics.³ However, Hayakawa was censured for his above remarks at a meeting of some faculty members, who alleged that he was interfering with academic freedom.⁴

All this raises the seemingly perplexing question of what is actually meant when one speaks of "academic freedom." Is it a mere illusion? This paper intends to examine that question. Before considering what academic freedom is, it is important here to point out, first, what academic freedom is not. Academic freedom does not mean "professional irresponsibility," that is to say, that professors can refuse to be held accountable for anything, as is sometimes the impression.⁵ Neither is academic freedom established as a substantive legal or constitutional right.⁶ In this regard, those eternal rights, like freedom of speech, press, worship, and the right of free elections—all sacred and inviolable, stand as an achievement by past generations of patriots. One does not have to do anything to earn these rights: they belong to a person automatically by virtue of citizenship in a democratic society, and the state is bound to respect them; yet, in order to be entitled to academic freedom a teacher must earn academic tenure.⁷

II. ACADEMIC FREEDOM AND TENURE

Tenure, the unique employment situation of an associate or full professor, is regarded as essential to academic freedom.⁸ Before gaining tenure, an instructor, whose academic credentials must include either a doctorate or some equivalent intellectual or artistic achievement, serves as an apprentice professor, or junior faculty member, for a

² *Id.*

³ See 116 Cong. Rec. S17728 (daily ed. Oct. 12, 1970).

⁴ *Supra* n.l.

⁵ *Id.*

⁶ Luis Kutner, *Habeas Scholastica: An Ombudsman for Academic Due Process—A Proposal*, 23 U. Miami L. Rev. 107, 134, 141 (1968).

⁷ *Supra* n.l.

⁸ *Supra* n.6 at 122.

probationary period of at least three years, but not to exceed seven. This rule will vary with the institution. Although during this time the teacher should have considerable freedom with the other faculty members, still he is more amenable to discipline and his ideas and actions are subject to the censure of non-reappointment.⁹ The university may or may not renew the contracts of these employees; or, it may raise them to tenure as it sees fit. Whether or not a teacher is finally granted tenure—and the full academic freedom that goes with it—is a decision made on the basis of the teacher's record with faculty seniors, subject to the approval of the department head, the dean and president.¹⁰ According to Walter Lippman, who put it in these terms:

[T]he community of scholars . . . are the court of last resort in determining the qualifications of admission to the community. . . . The selection and tenure of the members of the community of scholars is subject to the criterion that scholars shall be free of any control except a stern duty to bear faithful allegiance to the truth they are appointed to seek.¹¹

Once granted tenure, a teacher is now, by definition, a fully qualified professional in his (or her) particular field and is, to use the words of Hayakawa, "certified as not being an amateur, a dilettante or a crackpot," so that "you may not be fired for your views within those fields in which your competence is established."¹² Thus, the rights of professors who have permanent or continuous tenure are protected, for dismissal may only occur for adequate cause, retirement for age, or termination of services under extraordinary circumstances due to financial exigencies.¹³

The rules of university charters or boards of trustees define in various ways the term "cause": it may be stated simply as "cause," "serious cause," or "conduct seriously prejudicial to the university through the deliberate infraction of law or commonly accepted standards of morality, neglect of duty, inefficiency or incompetency." Still, once the administration governing body has adopted a dismissal for cause rule, it cannot be withdrawn in order to allow present employees to be dismissed for less than cause. A tenure system thus creates what is

⁹ *Id.*; *supra* n.l.

¹⁰ *Supra* n.l.

¹¹ *Supra* n.6 at 129.

¹² *Supra* n.l.

¹³ *Supra* n.6 at 141.

substantially private grievance machinery operating under privately developed standards.¹⁴

Tenure provides for a hearing of some sort to determine whether or not a professor shall be dismissed for cause, and there should be appropriate procedures to insure that such hearings will be conducted with appropriate preservation of due process to protect teachers from being arbitrarily dismissed.¹⁵ If possible, termination or dismissal for cause should be considered by both a faculty committee and the governing board of an institution; and, where facts are disputed, the accused teacher should be informed in writing before the hearing of the charges against him and should have the opportunity to be heard in his defense, with the assistance of counsel or an adviser, and a full stenographic record should be kept.¹⁶

Absent tenure, there may be many instances in which the teacher may have contractual rights under his contract of employment, and these rights of the non-tenured instructor may be subject to judicial enforcement.¹⁷ The proper remedy for failure to comply with contractual obligations is an action against an institution for monetary damages filed by the faculty member who is not re-appointed.¹⁸ Nevertheless, if formal procedures are followed, a court may decline to consider even an indefensible result in a contract action unless a specific contract term has been violated.¹⁹ The court has declined to intervene, for instance, in a dispute involving two non-tenured faculty members who were suspended with pay for taking part in a sit-in at a campus of City University of New York—a charge to which they pleaded guilty in earlier criminal proceedings. The court, in rejecting the teachers' contention that they were denied due process because hearings were not held promptly, refused to issue a mandatory reinstatement order since the suspensions were with pay and in accord with proper regulations for handling the final disposition of charges against them by a faculty panel appointed to review the evidence.²⁰

¹⁴ *Id.* at 122-23, 141.

¹⁵ *Id.* at 140-41.

¹⁶ *Id.* at 123.

¹⁷ *Id.* at 141.

¹⁸ *Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969).

¹⁹ *Supra* n.6.

²⁰ *MacDonald v. Schmeller*, No. 69 C1427 (E.D.N.Y. 1969).

Professors at older colleges held office indefinitely on good behavior, their tenure depending on usage. Because a professor had no legal status, he could be fired at will by the governing boards and the courts would not review their actions; in many institutions, moreover, a hearing was not even required.²¹

One historic pre-Civil War case bearing on a professor's legal status was the *Murdock*²² case, which involved a professor who had been removed from his professorial chair at Phillips Academy (in Andover) upon trial. The professor, claiming the articles of charge were not sufficiently definite and particular, challenged the statutory right of the visitors to dismiss a professor whenever, in their judgement, there was "sufficient cause." The court would only review the case to see whether or not the accused was given his common law right to a free hearing, though it implied that a professor was more than a mere employee, holding that no man could be deprived of his office—"which is valuable property"—unless he had the offense with which he was charged, fully, plainly and substantially described to him. On appeal, the Massachusetts Supreme Court declared that it was for the officers of the institution to decide the "gross neglect of duty," which it said had been adequately demonstrated, that warranted dismissal. Though this case was to set a precedent of judicial restraint in reviewing actions of trustees that prevailed in a later period, this notion did not survive the ante-bellum period;²³ for, in a Pennsylvania case, for example, the court declared that a professor was an employee, rather than an officer of a university corporation.²⁴

In several post-Civil War cases, it was the professors themselves who claimed the status of employees in order to seek contractual protections against the abolition or vacation of their offices by legislatures or trustees.²⁵ In one case, a professor, seeking to establish himself as an employee, sued to recover the salary which the Regents of the University of Wisconsin had decided to pay no longer. The court, in upholding the professor, stated that a professor stands "purely in a

²¹ R. Hofstadter and W. Metzger, *The Development of Academic Freedom in the United States* 230, 462 (1956).

²² *Murdock*, Appellant, 24 Mass. 303 (1828).

²³ *Supra* n.21 at 462-63.

²⁴ *Union Co. v. James*, 21 Pa. 325 (1853).

²⁵ *Supra* n.21 at 465.

contract relation" to "the board of regents . . . that employed him."²⁶ Also after the Civil War, the courts were called upon to decide whether state statutes vesting discretionary power in the hands of the regents to dismiss professors voided the tenurial protection of contracts.²⁷ In one such case *Board of Regents of the Kansas Agricultural College v. Mudge*,²⁸ the court refused to make the governing board so supreme that it would be able to violate any agreement entered into with a professor. It was the court's opinion that

[W]hile the legislature unquestionably intended to confer upon the board of regents extensive powers yet it did not intend to confer upon them the irresponsible power of trifling with other men's rights with impunity; and making the regents responsible for their acts does not in the least abridge their powers. It only tends to make them more courteous and circumspect in the exercise of their powers.^{28a}

In the late 19th and early 20th centuries the pendulum of judicial opinion began to swing back in favor of the precedent established earlier in *Murdock*, the interpretation that trustees and regents, unless the statutes so provided to the contrary, were empowered to dismiss professors at will prevailed in the courts.²⁹ In *Gilliam v. Board of Regents of Normal Schools*³⁰ it was held that the board could remove a professor without a trial of charges. In another case the court held that when the legislature "gave the board of regents power to hire and dismiss employees . . . they did not grant the board the power to bind themselves, or to bind others . . . by a contract different from the one which was prescribed by statute."³¹ The court in *Ward v. The Regents of Kansas State*³² decided that a statute which authorized the regents to remove any professor "whenever the interests of the college required" became a condition for employment, thereby overruling all contractual provisions to the contrary. And, indeed, the court in *Hartigan v. Board of Regents*³³ denied that it had any rights to exercise judicial review of the boards of regents. The board, as far as the court was concerned, could do as it pleased, *sans* control—"erroneous as its action may be."

²⁶ *Butler v. Regents of the University*, 32 Wis. 8 (1894).

²⁷ *Supra* n.21 at 465.

²⁸ 21 Kan. 223 (1878).

^{28a} *Id.* at 229.

²⁹ *Supra* n.21.

³⁰ 88 Wis. 8 (1894).

³¹ *Devol v. Board of Regents*, 6 Ariz. 259, 262, 56 P. 737, 738 (1899).

³² 138 F. 372 (8th Cir. 1905).

³³ 49 W. Va. 14 (1910).

Further, in another case, the court held that the actions of trustees were permissible under the contractual clause allowing it to dismiss professors when "the interest of the college shall require it."³⁴ To be sure, these cases had the effect of again reducing the professor's legal status.³⁵

Today, while the privilege doctrine has declined in significance in that the teacher is now entitled to be protected from summary dismissal,³⁶ the courts still recognize that a position of employment is not a constitutional right. This is exemplified by a 1969 Colorado case where the appeals court said that a professor had no constitutional right to expect re-appointment. When an associate professor at a state college was not re-appointed for another year by the board of trustees, he brought suit under the Civil Rights Act claiming that failure to re-appoint him was a denial of his constitutional rights in that termination of his employment was based on his religious and political views. The court, which said there was no federal right to expect continued employment, felt that the board was both justified and authorized under state law to remove faculty members. According to the court, this provision "specifically denies an expectancy to continued employment."³⁷

The Illinois Supreme Court in *Koch v. Board of Trustees*³⁸ also found no constitutional issues involved in the dismissal of a biology professor who wrote a letter to a student newspaper advocating "immoral behavior" between the sexes at college. The President found such views expressed in the letter to be "offensive, repugnant and contrary to commonly accepted standards of morality." So the professor, employed under a two-year contract, was "relieved of his university duties" during his first year. After a hearing, a faculty committee recommended a reprimand rather than a discharge; but the board of trustees ordered his discharge after the first academic year. The professor then brought an action for breach of contract which was dismissed by the trial court. A subsequent appeal to the state supreme court was denied. When the case was then transferred to the appellate court the supreme court's dismissal of the case was affirmed.

³⁴ *Darrow v. Briggs*, 261 Mo. 244, 273 (1914).

³⁵ *Supra* n.21 at 466.

³⁶ *Supra* n.6 at 141.

³⁷ *Jones v. Hopper*, 410 F.2d 1323, 1329 (10th Cir. 1969).

³⁸ 39 Ill. App. 2d 51, 187 N.E.2d 340 (1962); *cert. den.* 375 U.S. 989.

Thus, courts have upheld dismissals for clear violations of any reasonable administrative rule for governing faculty behavior, like the case of a University of Florida law professor who sought election as circuit judge in violation of a rule prohibiting university employees from engaging in political activities. He was dismissed prior to the expiration of his one-year contract and the Florida Supreme Court found this to be a reasonable regulation of public employment, rejecting any constitutional issue.³⁹

In *Hare v. Howard University*,⁴⁰ some non-tenured faculty members were notified by their private university that their appointments would not be renewed because they had participated in disorderly campus demonstrations. A federal district court ruled that non-tenured instructors of a private school had no contractual right to be reappointed merely because that school did not adhere to its informal policy of giving written notice of its intention not to renew. The policy on faculty renewals, as contained in the school regulations, expressly indicated that the school was under no contractual obligation to give notice. Even a contractual obligation to hire a teacher, the court added, could not be specifically enforced through a court order requiring reinstatement.

Nevertheless, of the developments in the law, the due process clause has been increasingly invoked as a safeguard against the arbitrary dismissal of teachers. The premise of the courts is on the existence of a substantive constitutional liberty which has been denied without due process.⁴¹ Indeed, it has been held that a state has no license to embark on a discriminatory hiring policy or any other arbitrary or capricious course of action.⁴²

In *Trister v. University of Mississippi*⁴³ two law school faculty members were fired by a state-supported university for violating a school policy which prohibited law faculty from accepting part-time employment with anti-poverty programs—though other outside employment was permitted. In reversing the lower court, the United States court of appeals declared that the firings disregarded the equal protection clause of the 14th amendment; and, in the court's opinion, there

³⁹ *Jones v. Board of Control*, 131 So. 2d 713 (Fla. 1961).

⁴⁰ 412 F.2d 1128 (D.C. Cir. 1967).

⁴¹ *Supra* n.6 at 140-41.

⁴² *Greene v. McElroy*, 360 U.S. 474 (1959).

⁴³ 420 F.2d 499 (5th Cir. 1969).

was no evidence that legal services jobs would interfere with teaching duties.

Even more recently, the court in *Lafferty v. Carter*⁴⁴ ordered a university to reinstate four professors who were not afforded due process. They were suspended from their teaching positions and barred from campus because the school felt that if they remained in their positions they would harm the school. However, as the court noted, the professors had neither received notice on what the charges were against them nor to be heard on these charges; though notice of suspension was given, it "failed to state in any intelligible way the basis for the action." In issuing a temporary restraining order, the court said:

[T]o say that one finds harm to the university may result if a professor is continued in his present position is to tell him nothing which permits him to defend himself. It is difficult to conceive a more complete failure to accord the rudiments of due process of law.^{44a}

In another 1970 case, a non-tenured assistant professor, who had been critical of the administration during campus disorders, was not re-hired by a state university for another year. The university claimed the professor had violated university rules and neglected his teaching duties. The professor, for his part, maintained that his constitutional rights of due process had been violated: he was given no notice or hearing. The court ruled in his favor, ordering the school to furnish the professor with a statement of reasons why it did not intend to retain him and notice of a hearing at an appointed time and place—thereby, satisfying procedural safeguards.⁴⁵

Where the court has discussed the due process requirements for non-tenured professors, it has been said that substantive protection of constitutional rights does not hinge on whether a teacher at a state university is tenured or not. Yet, the court does recognize the substantial distinction between the non-tenured and tenured professors and, in applying the constitutional doctrine on a case-by-case basis, is bound to respect a less severe standard, based on minimal factual support and subtle reasons as to whether employment is to be terminated for a non-tenured instructor, than the standard of "cause" applied to a professor with tenure.⁴⁶

⁴⁴ 310 F. Supp. 465 (W.D. Wis. 1970).

^{44a} *Id.* at 469.

⁴⁵ *Roth v. Board of Regents*, 310 F. Supp. 972 (W.D. Wis. 1970).

⁴⁶ *Id.*

III. THE TRADITION OF ACADEMIC FREEDOM

Academic freedom had its roots in the academies of Socrates and Plato in Ancient Greece adhering to the principle that the only life worth living is the examined life.⁴⁷ And in the Middle Ages the autonomous corporate universities regarded academic freedom as independence from the community. While some academicians have, from time to time, proposed what seems like a return to the corporate autonomy of medieval universities, the modern American university has, for the most part, eschewed militancy and stressed the idea that it has no corporate judgement on disputed public questions of the day. Of course, its professors may engage in such public activities, if they so choose, but it is expected of them that they will dissociate their own opinions from the university's reputation—and the university holds out the hope, at least, that the public will understand that a professor is speaking only for himself.⁴⁸ It should be clear, then, that individuals or groups of faculty members who engage in political activities are not considered to be acting on behalf of the university.⁴⁹ The general feeling in the United States is that universities have no place in politics; most academic men agree. However, under the pressure from some professors, in concert with student activists, for a university to commit itself to various political causes there is present a danger of violating the principle of non-involvement.⁵⁰

Because American universities have felt a responsibility to the public, as the basis for academic authority, there was a time when the responsibility a professor had to the public was deemed to be no less than that of the institution in which he served. He was looked upon as "morally amenable." Indeed, a university would think twice before appointing a teacher whose views—however acceptable they may have been to the trustees—challenged those of the community, lest it subject the entire institution to criticism.⁵¹ Furthermore, in the early years of the Republic, the politics of a professor were taken into consideration as a relevancy to his competence. It was not common that a professor of one political party would be appointed by a board of trustees (trust-

⁴⁷ *Supra* n.6 at 121, 128.

⁴⁸ *Supra* n.21 at 9-10.

⁴⁹ 116 Cong. Rec., S17729 (daily ed. Oct. 12, 1970).

⁵⁰ *Id.* at S17724-6.

⁵¹ *Supra* n.21 at 407.

ees for the public) which was dominated by members of another party; and in those rare cases when it did happen, it still "did not make for an easy tenure."⁵²

While the first colleges in the United States were congregational institutions in which free inquiry developed out of a toleration for differing religious views, academic freedom was really stimulated by the growth of Darwinism and scientific skepticism.⁵³ The principle of academic freedom was also influenced particularly by the concept of *lehrfreiheit* which Americans who had studied at German universities brought back to the United States and adapted to the American context, especially in the establishment of graduate schools.⁵⁴ Whereas, in Germany *lehrfreiheit*, or the right of a professor to engage in learning and research, unfettered by administrative regulations on the teaching situation, was premised on philosophical speculation. These principles of academic freedom came to be identified with the need of scientific investigation and empiricism in America.⁵⁵ In the search for truth, scientific investigation, with norms of neutrality and completeness, was to be employed, and only facts were the arbiters of what was truth.⁵⁶

American norms, reflecting a stronger social and constitutional commitment to the concept of free speech, were more permissive than were the Germans. Thus, professors were allowed to make utterance on extramural subjects outside the university and their role as teachers.⁵⁷ Although quite a few German professors were active in politics during the 19th century, *lehrfreiheit* did not generally protect or condone such activities for it was assumed that participation by professors in partisan politics spoiled habits of scholarship.⁵⁸ So, to a greater degree than his German counterpart, the American university professor was quite active in the social and political arena. As such, the concept of civil liberties was to become a part of academic freedom since the professor now demanded the same protection of freedom of speech that was given to other American citizens. He found these favorable conditions in the

⁵² *Id.* at 247.

⁵³ *Id.* at 236-37, 278.

⁵⁴ *Supra* n.6 at 121-22.

⁵⁵ *Supra* n.21 at 385-89.

⁵⁶ *Supra* n.6 at 122.

⁵⁷ *Supra* n.21 at 403-04.

⁵⁸ *Id.* at 389.

post-bellum universities: teachers were granted time to engage in outside activities; professional scholars were brought in; there were appointments of men whose interests were not totally engrossed by campus duties; and professors turned from their retreat of moral philosophy to a more worldly concern for society. Besides, this was accompanied by the rise of pragmatism, which believed in harnessing trained intellectualism to varied problems.⁵⁹

The American Association of University Professors were the first to formulate the principles of academic freedom in 1915. These principles were re-formulated in 1940 by the AAUP in conjunction with the American Association of Universities, comprising college presidents.⁶⁰ This *Statement of Principles on Academic Freedom and Tenure* asserted that the common good depends upon the preservation of freedom in teaching, inquiry, and expression.⁶¹ Academic freedom "in its teaching aspect" was regarded as "fundamental for the protection of [those] rights. . . ." The statement went on to uphold the teacher's right to full freedom in research and the publication of the results, and to freedom in the classroom in discussing his subject. Yet, he was cautioned not to introduce into his teaching "controversial matter" which had no bearing on his subject. And, when the teacher speaks or writes as a citizen he should be free from institutional censorship or discipline, the statement declared; but it took pains to remind him that as a teacher he had a special position in the community which imposed upon him a special obligation to "at all times be accurate, . . . exercise appropriate restraint, . . . show respect for the opinions of others, and . . . make every effort to indicate that he is not an institutional spokesman," for the public may judge his institution and profession by the utterances he makes.⁶²

During the 1950s a debate raged over whether a college professor who was a member of or associated with the Communist party should be allowed to teach. The American Association of Universities stated that "a scholar must have integrity and independence and this renders impossible adherence to such a regime as that of Russia. . . ." So, in

⁵⁹ *Id.* at 404-05.

⁶⁰ *Supra* n.6.

⁶¹ 116 Cong. Rec. E10139 (daily ed. Dec. 8, 1970).

⁶² *Supra* n.6.

essence, Party membership alone was enough to "extinguish the right of a university position."⁶³

The AAUP took an opposite stand on the issue. They felt "the need for academic freedom is greater, far greater, than ever before." In a statement issued at the time of the controversy, the Association called for vigilance in the academic community, whose duty it was "to defend society and itself from subversion of the educational process by dishonest tactics, including political conspiracies to deceive students and lead them unwittingly into acceptance of dogma or false causes." And, providing there was "reasonable evidence" that a professor had used such tactics, the statement added, he "should be expelled from his position if his guilt is established by rational procedure." However, the AAUP opposed both the imposition of disclaimer oaths by trustees to certify that members of the staff were free of subversive taint and investigations of individuals where there was no reasonable suspicion of or intent to engage in illegal or unprofessional conduct. Relative to "the question of dismissal for avowed past or present membership in the Communist party taken by itself," the AAUP maintained that grounds for removal were only justifiable by applying the same principle in other cases of establishing unfitness to teach due to "incompetence, lack of scholarly objectivity or integrity, serious misuse of the classroom or of academic prestige, gross personal misconduct, or conscious participation in conspiracy against the government." At length, the statement of the AAUP concluded that "simple membership in the [Communist] Party has not yet been clearly defined as illegal," and so "the influence of the academic community should . . . be directed against the proscription of membership in a movement which needs to be kept in view rather than driven underground."⁶⁴

Certainly while people with communist sympathies should not be employed in government, it is rather doubtful whether a professor's past or present political associations or philosophy should be, in itself, a basis for determining faculty status. Mere membership in the Communist party, to reinforce the AAUP statement, should not be the deciding factor on whether a person is hired to or fired from a job in a college. Let the teacher be judged, instead, on pedagogic merits—not

⁶³ *Id.* at 123, 126-28.

⁶⁴ *Id.* at 123-24, 127.

on political associations. If, however, evidence is presented in accord with due process, which establishes that a faculty member is using his job to spread and teach doctrine intended to undermine and overthrow the government in favor of the communist state, then that would be grounds for terminating his faculty status. Aside from academic freedom, those faculty members so involved who object to *any* investigation are claiming a freedom that does not exist. To be sure, freedom of thought should mean freedom from orthodox dogma, with the right of others to think differently from one's self; but such persons as those described immediately above not only want the right to express unorthodox dogma differing from others, they want also to be free from public criticism for expressing these opinions. Surely, people in this country have a right to criticize communists—even to the extent that this criticism may drive someone from a position where he is able to influence others. Professors are no more immune from such criticism or action than anyone else. Still, it is important to re-state, for the sake of academic freedom, that no professor should be fired simply for being a communist—unless, as previously noted, it is certain that he was teaching communism or having some effect on the development of the thoughts of the student in that direction. There seems to be no particular purpose in examining the views of a few individual professors if they are not a part of any organization promoting the spread of communism.

IV. THE COURTS AND THE LOYALTY OATH

The imposition of loyalty oaths requiring teachers to deny membership in associations as a condition precedent to employment or retention at state supported schools have given rise to many cases in the courts. Generally, the Supreme Court has found disfavor with such oaths, and this was reflected in a case in which college faculty members brought action attacking an Oklahoma statute requiring that all state employees attest that they were not now or had been during the past five years members of organizations listed as Communist front or subversive by the U.S. Attorney General.⁶⁵ The Court invalidated the statute because of indiscriminate classification of innocent with knowing membership. In his concurring opinion Mr. Justice Frankfurter, joined by Mr. Justice Douglas, emphasized that teachers, as “the ex-

⁶⁵ *Wieman v. Updegraff*, 344 U.S. 183 (1952).

emplars of open mindedness," must be protected in their first amendment rights to freedom of thought, speech, worship, and "the freedom of responsible inquiry . . . to sift evanescent doctrine, qualified by time and circumstance, from the restless, enduring process of extending the bounds of understanding and wisdom . . ." and that "The function of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and National power."^{65a}

*Shelton v. Tucker*⁶⁶ examined a statute directed at the NAACP. The statute required that every teacher, as a condition for employment in the state school system, make a disclosure, via affidavit, of every organization with which he had been associated with over a five-year period. Even though the Supreme Court acknowledged that a state's inquiry into a teacher's competence may be relevant, it did strike down the statute in question for the reason that this inquiry was so unlimited and indiscriminate that it constituted a prior restraint on the rights of freedom of speech and association under the first amendment and due process under the fourteenth. This opinion was based on *Sweezy v. New Hampshire*⁶⁷ where the Court had ruled that a statute authorizing a state's Attorney General to investigate "subversive persons" and "subversive organizations" was too broadly drawn; in so deciding, the Court reversed a contempt conviction of a professor who had refused to answer the questions of the Attorney General. Also, in *Cramp v. Board of Public Instruction*,⁶⁸ a Florida statute requiring a teacher to swear, as a condition of initial employment, that he had never lent his "aid, support, advice, counsel or influence to the Communist Party" was invalidated as being too vague.

In *Bagget v. Bullitt*⁶⁹ faculty members were joined by staff and students at the University of Washington in challenging an oath of allegiance to the United States, incorporated in a 1955 statute whereby a teacher had to swear he was not a "subversive person," or anyone, as it was so defined, "who commits, attempts to commit, or aids in the commission of any act intended to overthrow, destroy or alter, or assist

^{65a} *Id.* at 197.

⁶⁶ 364 U.S. 479 (1960).

⁶⁷ 354 U.S. 234 (1957).

⁶⁸ 368 U.S. 278 (1961).

⁶⁹ 377 U.S. 360 (1964).

in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington. . . ."^{69a} The Court found these requirements unduly vague, uncertain and broad, and struck down the oath. Regarding the hazard of prosecution for "knowing but guiltless behavior," the Court found that oaths do not provide an "ascertainable standard of conduct or that it does not require more than a State may command under the guarantee of the First and Fourteenth Amendments."^{69b}

Federal district courts have also declared laws requiring non-subversive oaths to be unconstitutional either because of vagueness or violation of the first amendment by prohibiting state employment for membership *sans* any specific intent to further the aims of a subversive organization. Thus, such laws have been struck down in Texas⁷⁰ and Kansas,⁷¹ and in Washington, D.C.,⁷² where the court, citing recent Supreme Court decisions, ruled that an oath requiring all city employees to state they were not members of an organization advocating the overthrow of a constitutional form of government was overbroad when applied to college teachers, and, hence, unconstitutional. Furthermore, in two consolidated cases involving teachers—one of them a university lecturer—who were denied pay because of their refusal to sign an Illinois loyalty oath requiring all state employees to affirm they were not members of the Communist party and not knowingly affiliated with any organization which advocated the overthrow of state or federal government by unlawful means, a panel of three federal district court judges voided the oath as unconstitutional. Basing its decision on past Supreme Court cases, the federal court declared:

The Supreme Court's rejection of the 'knowledge' standard in favor of the test of 'specific intent' is an affirmation that the First Amendment protects the right to knowingly associate with some participation in the organization's illegal activities. Any lesser test . . . [would] chill . . . the right of free association.⁷³

The Supreme Court in *Whitehall v. Elkins*⁷⁴ ruled against a loy-

^{69a} *Id.* at 362.

^{69b} *Id.* at 372.

⁷⁰ *Gilmore v. James*, 274 F. Supp. 75 (N.D. Tex. 1967); *aff'd* 389 U.S. 572 (1968).

⁷¹ *Ehrenreich v. Londerholm*, 273 F. Supp. 178 (D. Kan. 1967).

⁷² *Haskett v. Washington*, 294 F. Supp. 912 (D.D.C. 1968).

⁷³ *Thalberg v. Board of Trustees of University of Illinois*, 309 F. Supp. 630 (N.D. Ill. 1969).

⁷⁴ 389 U.S. 54 (1967).

alty oath administered to the teachers in all Maryland schools; the oath required teachers to swear they were not "engaged in one way or another in the attempt to overthrow the Government . . . by force or violence."^{74a} The Court declared the definitions of "subversive" and "subversive organizations" in a state statute to be read in conjunction with the oath and the words "in one way or another" were "so vague and broad as to make men of common intelligence speculate at their peril on its meaning."^{74b} There was an indistinct line between permissible and impermissible conduct; and the Court, in stressing the first amendment rights involved in regard to teachers, held that "the continuing surveillance which this type of law places on teachers is hostile to academic freedom"^{74c} in that, aside from possible perjury even if a person was ignorant of the real aims of a group and innocent of any illicit purpose, reasonable grounds for belief a person is subversive was cause for discharge.

The Maryland General Assembly had passed the above law with a separability clause, so that if any section of the law was ruled unconstitutional the rest of the statute would remain in force. The district court of the state then acted promptly by following up the Supreme Court's decision with a decree that *all* of the oath was unconstitutional, saying that "so much of the original Maryland scheme has been frustrated that we think the presumption of severability has been destroyed."⁷⁵

In *Keyishian v. Board of Regents*,⁷⁶ which had the effect of overruling a prior 1952 decision,⁷⁷ the Supreme Court struck down a loyalty scheme that sought to exclude teachers who were affiliated with organizations determined by the state Board of Regents to be subversive as based upon notice and hearings, with annual inquiries to be made for determining whether the teacher was qualified. The Court, finding the terms "treasonable or seditious acts" set forth in the disclaimer oath to be too vague and broad, held that mere membership in a subversive organization was insufficient as a basis for disqualification from employment: it likened this requirement for exclusion from public em-

^{74a} *Id.* at 55.

^{74b} *Id.* at 58-59.

^{74c} *Id.* at 59-60.

⁷⁵ *Whitehall v. Elkins*, 287 F. Supp. 61, 65 (D. Md. 1968).

⁷⁶ 385 U.S. 589 (1966).

⁷⁷ *Adler v. Board of Education*, 342 U.S. 485 (1952).

ployment to the requirement for criminal prosecution, the apparent assumption here being that mere membership is no more relevant to a teacher's merits to teach than it is to his danger to society in general. In his opinion for the Court, Mr. Justice Brennan reaffirmed the principle of academic freedom:

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . .⁷⁸

Mr. Chief Justice Warren saw fit to quote from his opinion in *Sweezy*, where he spoke of the area of academic freedom:

The essentiality of freedom in the community of American universities is almost self evident. . . . To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers . . . must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.⁷⁹

An Arizona oath required teachers to swear support and allegiance to both the federal and state Constitution, accompanied by a gloss that subjected to prosecution for perjury or discharge any person who "knowingly and wilfully becomes and remains a member of the Communist Party . . . or its successors or any of its subordinate organizations" or "any other organizations" whose purpose may be the overthrow of the state government or any of its political subdivisions. The oath was invalidated by the Supreme Court because it did not exclude association by one who does not subscribe to the organization's unlawful ends and, thus, threatens the right of freedom of association.⁸⁰ Otherwise, in those cases which involve positive loyalty oaths, where the taker only pledges to uphold the Constitution and federal and state laws, the Court has held such oaths to be constitutional.⁸¹

V. ACADEMIC RESPONSIBILITY

If academic freedom is to be preserved—even extended—then there must be academic responsibility. Academic freedom, like any

⁷⁸ 385 U.S. 589, 603 (1966).

⁷⁹ 354 U.S. 234, 250 (1957).

⁸⁰ *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

⁸¹ See, *Knight v. Board of Regents*, 390 U.S. 36 (1968); *Hosack v. Smiley*, 390 U.S. 744 (1968).

other right, carries with it concomittant responsibilities incumbent on those who live and work in the university community, especially professors.

Since its inception in 1915, the American Association of University Professors, now representing about 90,000 throughout the nation, has always stressed this mutual respect for the fundamental principles of academic freedom and the social responsibilities that such freedoms necessarily impose on the professor: in 1940 the AAUP issued a statement on the responsibility to exemplify and support the freedoms of teaching, expression, and research, as previously discussed; in 1958 came a statement concerning sound standards on faculty dismissals; and in 1966 the Association reminded the individual faculty member of his responsibility, through his own actions, to uphold his colleagues' and students' freedom of inquiry. More recently, in view of the continuing attacks visited upon the universities through intimidation, harassment, or political interference which may, in turn, create an atmosphere of repression, the AAUP, with a statement of November 6, 1970, relative to "freedom and responsibility," has reaffirmed its commitment toward insuring academic freedom by reiterating the inseparability of "the faculty's responsibility to defend its freedoms" and "its responsibility to uphold those freedoms by its own actions."⁸²

Whereas membership in the academic community imposes an obligation to respect the dignity of others and their right to express differing opinions on and off campus, the treasured freedom of honest dissent and any attempt to effectuate change must not be carried out in such a manner that is injurious to other individuals or in any way significantly disruptive to the functions of an institution of higher learning.⁸³ Although courts have indicated they will protect free speech, they have also indicated that activity going beyond "pure speech" is not entitled to the same protection: faculty activity will not be protected nor tolerated when it reaches the point of instigation, such as encouraging or participating in student disorders, or when it amounts to insubordination, such as failure to conduct required classes in sympathy with a student strike. Take, for instance, a case where the New York Supreme Court in Queens County convicted three professors, who had played leading roles in staging a sit-in and in engaging in other dis-

⁸² 116 Cong. Rec. E10139-40 (daily ed. Dec. 8, 1970).

⁸³ *Id.* at 10139.

ruptive actions, for contempt in violating the court's injunction against such sit-ins or strikes. In sentencing the trio of recalcitrant faculty members, the court observed that they were "all intelligent adults and certainly they should be prepared to face the consequences of their acts. Their functions on the campus were to teach and not to disrupt, to educate and not to instigate."⁸⁴

In the event a professor is so concerned over the situation of world politics that he is unable to continue with his job of teaching, he should follow the advice suggested by the AAUP statement:

Because academic freedom has traditionally included the instructor's full freedom as a citizen, most faculty members face no insoluble conflicts between the claims of politics . . . on the one hand, and the claims and expectations of their students, colleagues and institutions on the other. If such conflict becomes acute and the instructor's obligation as a citizen and moral agent preclude the fulfillment of . . . academic obligation *he should either request a leave of absence or resign.*⁸⁵

In their relationship to students, faculty members should treat the student fairly. The aspects involved in this relationship, as recited by the Association's statement, mean that a teacher may not refuse to enroll or teach students on the basis of their beliefs or the possible use to which they might put the knowledge to be gained from the course; nor should an instructor use the inherent authority of his teaching role to force upon a student a particular course of political action. When it comes to evaluating students and awarding credit, such matters as personality, race, religion, politics or personal beliefs are irrelevant; the student must be judged professionally on his academic performance alone.⁸⁶

American academic opinion did not accept the idea, which found favor in Germany, that it was for the professor to convince or win over his students to his own philosophical views. Instead, the proper stance for American professors was to maintain neutrality on controversial issues, as far as actions in the classroom were concerned.⁸⁷ In the American colonies as early as 1756, a committee of trustees at Philadelphia addressed the problem of biased instruction in the following language:

⁸⁴ Board of Higher Education v. Students for a Democratic Society, 60 Misc. 2d 114, 300 N.Y.S.2d 983 (1969).

⁸⁵ *Supra* n.1 (emphasis added).

⁸⁶ *Supra* n.82.

⁸⁷ *Supra* n.21 at 200.

[N]o single Master can, by the Constitution of the College and Academy, carry on any separate or party-scheme, or teach any principles injurious to piety, Virtue and good Government, without an evident failure of Duty in the whole Body of Trustees and Masters. . . .⁸⁸

It was Charles W. Elliot who later pronounced in his remarks upon becoming president of Harvard in 1869,

It is not the function of the teacher to settle . . . philosophical controversies for the pupil, or even to recommend to him any one set of opinions as better than any other. Exposition, not imposition, of opinions is the professors part. . . .⁸⁹

The AAUP statement for 1970 treated the matter in these terms:

It is a teacher's mastery of his subject and his own scholarship which entitle him to his classroom and to freedom in the presentation of his subject. Thus, it is improper for an instructor persistently to intrude material which has no relation to his subject, or to fail to present the subject matter of his course as announced. . . .⁹⁰

The Association has also offered some supplementary standards for faculty self-regulation. Among such plans, faculty members are urged to take the initiative and work with university administrators and others in the academic community to maintain an atmosphere conducive to freedom and academic inquiry—with respect for the academic rights of others, and to develop procedures to be utilized whenever there may occur serious disruption, or threat of disruption. Likewise, attention should be given to providing a more versatile body of academic sanctions other than dismissal, as to warnings and reprimands, for example; finally, the Association felt it was important for the faculty to “recognize their stake in promoting adherence to norms essential to the academic enterprise” and be more vigorous in defending academic values against unjust criticism from its own members.⁹¹

A newly-formed organization, University Professors for Academic Order, was begun by a group of dedicated scholars who sought to resist the dangers of campus disorder that threaten the academic society and the systems of higher learning. It has witnessed a rapid growth with chapters being established at universities across the country. One of the organization's purposes, as outlined in their newsletter of December 1970, is “to restore the integrity of academic personnel by having

⁸⁸ *Id.* at 202-03.

⁸⁹ *Id.* at 400.

⁹⁰ 116 Cong. Rec. E10140 (daily ed. Dec. 8, 1970).

⁹¹ *Id.*

members of the profession devote their efforts and time again primarily to the principal objectives of American higher education, namely *academic* teaching, research and scholarship." One factor given as a cause of undermining the integrity of the academic profession is the trend toward "politicizing" the personnel policy, in that hiring, firing, and tenure policies are based, it is contended, on extra-academic criterion of socio-political activism: the "willingness" on the part of a professor to accept "the attempted transformation of our universities into either full or part-time indoctrination centers."⁹²

Related to this, to be sure, is the concern expressed in some quarters over the lack of a "spectrum of opinion" among academicians in those departments which deal with "controversial issues as subjects for scholarship," such as economics, political science or law, where there are few conservatives and middle-of-the-roads represented.⁹³ Indeed, this might amount to what has been called a "conspiracy," to wit: liberal factions could take-over a political science department and hire more political scientists like themselves to out vote and, at length, dispose of all other kinds. Given such a situation, the department as then constituted would not provide a fair representation of diverse points of view in the discipline and, thus, offer no alternative to students who have a right to learn about other ideas,⁹⁴ like the more traditional approach to political science *vis-à-vis* behavioralism.

VI. CONCLUSION

In sum, the primary responsibility of protecting the academic freedom of all those at institutions of higher learning rests with those who are themselves components of the institution. Faculty members, as an important part of the academic community, must share in the responsibility of maintaining the appropriate atmosphere for the educational process at American universities. Unless the responsibility to maintain a free and uninterrupted process of education is accepted, the continuation of the rights academic freedom provides may be endangered.

⁹² 116 Cong. Rec., E10187 (daily ed. Dec. 10, 1970).

⁹³ *Id.* 17725 (Oct. 12, 1970).

⁹⁴ Cf. S.I. Hayakawa, *Academic Freedom Must Be Protected*. Chicago Tribune, Dec. 6, 1970, § 1A at 5 col. 1 & 2.

CHICAGO-KENT LAW REVIEW

Copyright 1971, Illinois Institute of Technology

PUBLISHED SPRING AND FALL BY THE STUDENTS OF
CHICAGO-KENT COLLEGE OF LAW OF ILLINOIS INSTITUTE OF TECHNOLOGY
10 N. FRANKLIN STREET, CHICAGO, ILLINOIS 60606
Subscription Price, \$4.00 per year
Single Copies, \$2.50
Foreign Subscription, \$4.50

EDITORIAL BOARD

Editor-in-Chief

THOMAS REMICK

Associate Editors

DENNIS COOLEY
GEORGE PAPPAS

Copy Editor

DONALD DUDYCHA

Staff

THOMAS BROWN
ROBERT GERAGHTY
LYLE HASKIN

JOHN KALNINS
BRUNO TABIS
RICHARD TRAVIS

BRUCE VODICKA
PAUL WHITE
FERN ZITTLER

Candidates

WYATT ANGELO
THOMAS CALLUM
LARRY COLBY
ZEV DACHS
MICHAEL GERSTEIN
PHILIP HENRICI

GERALD KALUZY
GARY KOSTOW
JEFFREY LADD
DENNIS MCFARLIN
DAVID NELSON
KEVIN O'KEEFE

JACK PINE
MICHAEL ROBBINS
THOMAS ROSENSTEEL
DENNIS SCHOVILLE
PETER SOLBER
JERRY WEBB

BOARD OF MANAGERS

PROFESSOR ROBERT J. O'CONNELL, *Chairman and Faculty Advisor*

PROFESSOR RALPH BRILL

DEAN FRED HERZOG

MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS

The Illinois Institute of Technology assumes no responsibility for any
statement appearing in the columns of this publication.

VOLUME 48

FALL-WINTER, 1971

NUMBER 2